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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 2

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation,
Appellant,

vs.

RUFUS E. DEERING, As Register of Deeds of Sedgwick County, Kansas, and MARIE WARDEN, As County Treasurer of Sedgwick County, Kansas,
Appellees.

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS.

JURISDICTIONAL STATEMENT.

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IN THE

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OCTOBER TERM, 1958.

No.

MISSOURI PACIFIC RAILROAD COMPANY,
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Appellant,

vs.

RUFUS E. DEERING, As Register of Deeds of Sedgwick County, Kansas, and MARIE WARDEN, As County Treasurer of Sedgwick County, Kansas,
Appellees.

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS.

JURISDICTIONAL STATEMENT.

Pursuant to Supreme Court Rule 13, paragraph 2, and Rule 15, appellant files this, its jurisdictional statement, as follows:

OPINIONS OF COURTS BELOW.

The opinion and judgment of the Supreme Court of the State of Kansas reversing the judgment of the District Court of Sedgwick County, Kansas, was delivered on March 7, 1959, and is reported in *Missouri Pacific Railroad Co. v. Deering*, 184 Kan. 283, 336 P.2d 482, and is appended hereto as Appendix "A." The opinion of the District Court of Sedgwick County, Kansas, dated February 6, 1958, which is unreported, is appended hereto as Appendix "B." The judgment of the District Court of Sedgwick County, Kansas, dated February 6, 1958, is appended hereto as Appendix "C."

GROUNDS ON WHICH JURISDICTION IN INVOKED.

This proceeding was originally brought by appellant against appellees in the District Court of Sedgwick County, Kansas, as a civil action to recover taxes in the amount of $262,969.96 exacted by and paid under protest to the Register of Deeds of Sedgwick County, Kansas, by appellant as a so-called mortgage registration fee (which the Supreme Court of Kansas has held to be a tax) under the provisions of Sections 79-3102 to 79-3107 of the General Statutes of Kansas, 1949 (G. S. 1949, 79-3102 to 79-3107), upon two mortgages filed and recorded by the reorganized Missouri Pacific Railroad Company in that county and 59 other counties in Kansas in compliance with an order of the federal court in which the railroad was reorganized requiring such mortgages to be filed and recorded by all recording officers "upon payment of their proper recording and filing fees," "the laws of any state to the contrary notwithstanding." (R. 12, 62-63). This action is author-

ized and was brought under the provisions of Section 79-2005 of the General Statutes of Kansas, 1949 (G. S. 1949, 79-2005), which provides for actions for the recovery of taxes paid under protest. The state district court rendered judgment on February 6, 1958, in favor of appellant for the sum of $262,969.96 and costs (R. 73-4) as prayed for in its petition. Appellees appealed to the Supreme Court of the State of Kansas (R. 75-7), which reversed the judgment of the district court on March 7, 1959, and ordered judgment for the appellees (R. 80-91). A motion for a rehearing (R. 93-106) was filed by appellant, which was denied on April 15, 1959, without opinion (R. 109) and the judgment became final. The notice of appeal herein was filed in the Supreme Court of the State of Kansas on June 2, 1959. (R. 110-12.)

The statutory provision believed to confer on the Supreme Court of the United States jurisdiction of this appeal is Section 1257 of Title 28 of the United States Code (62 Stat. 929), which provides that final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court of the United States by appeal (1) "where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity" and (2) "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The cases believed to sustain the jurisdiction of the Supreme Court to review the judgment are as follows:

Factors', etc., Ins. Co. v. *Murphy*, 111 U. S. 738, 741.

New Orleans, etc., R. R. Company v. *Delamore*, 114 U. S. 501.

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The statute of the United States the validity of which is involved is Section 205(f) of Title 11 of the United States

Code (53 Stat. 1406), which is appended hereto as Appendix "D."

There is further involved Section 10.04 of the Consummation Order and Final Decree (R. 18-72) issued and entered by the United States District Court for the Eastern District of Missouri, Eastern Division, pursuant to and under the authority of Section 205(f) of Title 11 of the United States Code (53 Stat. 1406), above referred to, in the reorganization proceedings of Missouri Pacific Railroad Company, which is appended hereto as Appendix "E."

The statute of Kansas the validity of which is involved is Sections 79-3102 to 79-3107 of the General Statutes of Kansas, 1949, and particularly Sections 79-3102, 79-3103 and 79-3107 thereof, which is appended hereto as Appendix "F."

It is important to observe at the outset that the Kansas mortgage registration statute here under attack has been more than once definitely held by the Supreme Court of Kansas to be not a fee but a tax, and that that state statute requires the payment of the mortgage registration tax by the mortgagee (not the railroad mortgagor) as a condition precedent both to the recording of mortgages and also to their enforceability.

QUESTIONS PRESENTED BY APPEAL.

The questions presented by this appeal are as follows:

1. Whether the United States District Court for the Eastern District of Missouri, Eastern Division, in the railroad reorganization proceedings entitled "In the Matter of Missouri Pacific Railroad Company, Debtor," had authority under the provisions of 11 U. S. C. Section 205(f), to re-

quire by Section 10.04 of its Consummation Order and Final Decree that appellant's two mortgages be filed and recorded by the Register of Deeds of Sedgwick County, Kansas, upon payment by the mortgagor railroad of the Kansas statutory filing and recording fees only.

2. Whether the provisions of 11 U. S. C., 205(f) (53 Stat. 1406), and Section 10.04 of the Consummation Order and Final Decree issued pursuant thereto, are valid and supreme and take precedence over the provisions of Sections 79-3102 to 79-3107 of the General Statutes of Kansas, 1949, which provide for the payment by mortgagees of a mortgage registration tax before mortgages may be filed and recorded.

3. Whether Sections 79-3102 to 79-3107 of the General Statutes of Kansas, 1949, and particularly their application to the filing and recording of appellant's two mortgages, violate Section 1 of the Fourteenth Amendment to the Constitution of the United States for the reason that such statutes and their application to appellant's two mortgages deprive appellant of its property without due process of law, and violate the provisions of 11 U. S. C., Section 205(f) (53 Stat. 1406).

STATEMENT OF THE CASE.

From 1933 to 1956 the Missouri Pacific Railroad Company was in reorganization proceedings in the United States District Court for the Eastern District of Missouri, Eastern Division, under the provisions of Section 77 of the Amended Bankruptcy Act (11 U. S. C. 205, 53 Stat. 1406), and all of its railroad and other properties were owned and operated by a trustee or trustees appointed by that court, and such trustees and the property of the railroad were under the jurisdiction of that court. (R. 9.)

On March 1, 1956, the reorganization proceedings were terminated and brought to a conclusion by a Consummation Order and Final Decree signed and issued by the bankruptcy court, and a plan of reorganization approved by the Interstate Commerce Commission and confirmed by the court was put into effect and the railroad became reorganized under that plan, and the reorganized railroad was thereby authorized, directed and empowered to do everything that became necessary or proper to carry out such plan and the Consummation Order and Final Decree, the laws of any state or the decision or order of any state authority to the contrary notwithstanding, in accordance with the provisions of Section 205(f) of the Amended Bankruptcy Act (11 U. S. C. 205[f]). (R. 9.)

Pursuant to and as part of the plan of reorganization, and as provided by the Consummation Order and Final Decree, all of the mortgages outstanding against the debtor railroad were declared null and void and discharged and satisfied, and were ordered released (R. 47-48) and the reorganized railroad was authorized and required to execute two mortgages, a First Mortgage in favor of Boatmen's National Bank of St. Louis, as Trustee, and a General (Income) Mortgage in favor of Manufacturers Trust Company and Charles Herman as Trustee, both mortgages covering the property of the railroad, including its property in Kansas. (R. 9-10.)

The Consummation Order and Final Decree also provided that such two mortgages should be filed and recorded, the specific provision with reference thereto being as follows:

> "10.04. *Recording and Filing Documents.* Upon payment of their proper recording and filing fees, all recording officers of recording districts (including Parishes and Cities, States and Counties) in which the

properties of the Reorganized Company shall be located after the Consummation Date shall record or file for record this Order as well as all documents the execution of which is directed in this Order, or in the documents herein approved, as may be tendered to them for filing or recording, and to make such marginal or other notations in their records as may be necessary or appropriate to evidence and to record the true intent and purpose of all such documents tendered to them for filing or for recording, the laws of any state to the contrary notwithstanding." (R. 12, 62-3.)

In compliance with the above-quoted provision and requirement of the Consummation Order and Final Decree, the reorganized railroad, on March 12, 1956, delivered and tendered the two mortgages to the Register of Deeds of Sedgwick County, Kansas, for filing and recording and paid the filing and recording fees thereon, but the Register of Deeds refused to record them until the mortgage registration tax provided by the Kansas statute (G. S. 1949, 79-3102 to 79-3107) in the sum of $262,969.96 was paid. (R. 12.) The reorganized railroad then paid the mortgage registration tax to the Register of Deeds under written protest (R. 5-6; 12-13) in order to obtain filing and recording of the mortgages in the office of the Register of Deeds of Sedgwick County, Kansas, and in the offices of the Registers of Deeds in the other 59 counties in Kansas where the railroad's property is located, in compliance with the Consummation Order and Final Decree.

On April 11, 1956, appellant, the reorganized railroad, brought this action by filing its petition in the District Court of Sedgwick County, Kansas, to recover the taxes so paid under protest. (R. 1-6.)

The federal questions sought to be reviewed in this court were first raised in the district court by pleading them in the petition filed by appellant as follows:

"6. Plaintiff further states that the exaction and imposition of said mortgage registration tax of $262,-963.96 and the payment of which was so made under duress and protest was and is invalid in each and all of the following particulars and for each and all of the following reasons, to-wit:

* * *

"(b) Said statute (G. S. 1949, 79-3102 to 79-3107) is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States for the reason that it takes property without due process of law;

"(c) Said statute is a burden on interstate commerce and an undue interference with the field occupied by the Interstate Commerce Act and by Section 77 of the Bankruptcy Act, and the enforcement of said statute has the effect of preventing plaintiff from carrying out the provisions of said Consummation Order for the recording of said mortgages unless a tremendously burdensome registration fee is paid for the privilege of having said mortgages recorded;

"(d) The jurisdiction conferred by acts of Congress upon the Interstate Commerce Commission and upon said Federal Reorganization Court to authorize liens and the issuance of securities upon the property of such interstate common carriers by railroad as the plaintiff is exclusive and plenary, and said state statute requiring the payment of said mortgage registration tax, as a condition precedent (1) to recording the mortgages or (2) to their reception in evidence or (3) to any judgment, decree or order for the enforcement thereof is an encroachment upon and in derogation of said Federal jurisdiction, and in violation of said Federal statutes, and also in contravention of the Fourteenth Amendment to the Constitution of the United States in that it would deprive the security holders of due process

of law and of the equal protection of the law." (R. 3-5.)

After an answer was filed by appellees admitting some of appellant's allegations and putting others in issue (R. 7-8), the case was submitted to the district court upon the pleadings and an agreed statement of facts (R. 8-17), and the district court, in effect, passed upon the federal questions pleaded by finding that the appellant was not subject to the payment of the mortgage registration tax and that it was entitled to have its two mortgages filed and recorded without payment of the tax, and by rendering judgment in favor of appellant for $262,969.96, the amount of the mortgage registration tax paid under protest by appellant. (R. 73-74.)

The federal questions were again raised in the Supreme Court of the State of Kansas upon appellees' appeal and by appellant's motion for rehearing, and the court passed upon them in its opinion and decision reversing the judgment of the district court by specifically holding adversely to appellant's allegations and contentions upon the federal questions (R. 86-90) and by denying appellant's motion for rehearing, in which they were again raised. (R. 93-106, 109.)

GROUNDS FOR CONTENTION THAT FEDERAL QUESTIONS INVOLVED ARE SUBSTANTIAL.

The grounds upon which it is contended the federal questions involved herein are substantial are:

This action involves the sum of $262,969.96 in taxes exacted unlawfully from the appellant railroad company, emerging from bankruptcy by reorganization in proceedings under the Amended Federal Bankruptcy Act, by state

recording officials under the Kansas mortgage registration law as a condition precedent to the recording of appellant's two mortgages, notwithstanding an order of the federal reorganization court requiring that, upon payment of proper recording and filing fees, such mortgages be recorded as a part of the reorganization proceedings and the reorganization plan approved by the court and by the Interstate Commerce Commission, "the laws of any state to the contrary notwithstanding," (R. 10, 62-3) which order was issued under the authority of and in compliance with Section 205(f) of Title 11 of the United States Code (53 Stat. 1406).

It has been contended at all times in this case that the refusal of the appellee register of deeds to file and record the two mortgages of appellant, the mortgagor (the filing and recording fees being tendered), unless the tax provided by G. S. 1949, 79-3102 to 79-3107 to be paid by the mortgagee was paid, was in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and the provisions of 11 U.S.C., Section 205(f) and the order of the United States District Court based thereon, and that the enforcement of the Kansas statute with respect to appellant's two mortgages would constitute a burden on interstate commerce. In this connection, the validity of the state statute as applied under the circumstances of this case was involved and the Kansas Supreme Court decided in favor of its validity.

Since the question of violation of the Fourteenth Amendment is involved, this court has jurisdiction to consider the case on appeal. (*Provident Savings Ass'n* v. *Kentucky*, 239 U. S. 103, 112; *Bluefield Co.* v. *Pub. Serv. Comm.*, 262 U. S. 679, 683; *Nor. Pacific* v. *Dept. Public Works*, 268 U. S. 39; *Ward & Gour* v. *Krinsky*, 259 U. S. 520;

Miller v. *Schoene*, 276 U. S. 272; *Fiske* v. *Kansas*, 274 U. S. 380; *Treagea* v. *Modesta Irrigation District*, 164 U. S. 179; *Cudahy Co.* v. *Parramore*, 263 U. S. 418, 422.)

This court also has jurisdiction on appeal where the question involved is whether or not the application of a state statute would constitute a burden on interstate commerce. (*Terminal Assn.* v. *Trainmen*, 318 U. S. 1; *Atchison R. Co.* v. *Pub. Util. Comm'n*, 346 U. S. 346.)

The Kansas Supreme Court in its opinion herein refused to take cognizance of and apply the rule of supremacy of acts of Congress as the law of the land as provided in the United States Constitution (Article VI) and applied many times by this court where there is a conflict between federal and state laws, by holding that the provisions of 11 U. S. C., Sec. 205(f) and the Consummation Order and Final Decree (Section 10.04) thereon based were ineffective to require the filing and recording of the two mortgages, "the laws of any state or the decisions or orders of any state authority to the contrary notwithstanding." The Kansas statute, as applied by the appellee Register of Deeds to appellant and the two mortgages involved by requiring that the mortgage registration tax must be paid as a condition precedent to the filing and recording of the mortgages, constituted a law and an order of a state authority (that of the Register of Deeds) which came within the prohibition of 11 U. S. C., Sec. 205(f)—"the laws of any State or the decision or order of any State authority to the contrary notwithstanding"—and the similar prohibition in Section 10.04 of the Consummation Order and Final Decree. The question of the validity and supremacy of the Federal Bankruptcy Law and the order of the Federal Bankruptcy Court was thus clearly a question at issue in this case, and the Kansas Supreme Court in effect held against its validity and supremacy as applied to the facts and circumstances

of this case and in effect held in favor of the validity of the state statute with respect to such facts and circumstances. It is clear this situation presents a federal question and this court has jurisdiction. It has been so held in the following cases: *Stoll* v. *Gottlieb*, 305 U. S. 165; *Case* v. *Bowles*, 327 U. S. 92, 102; *R. F. C.* v. *Beaver County*, 328 U. S. 204, 206-7; *Morris* v. *Jones*, 329 U. S. 545, 553; *Seaboard R. Co.* v. *Daniel*, 333 U. S. 118.

It is also apparent that a right, privilege or immunity under a statute of and authority exercised under the United States is claimed and was specially set up in this case and thus a federal question was and is presented and this court has jurisdiction for that reason. (*Factors', etc., Ins. Co.* v. *Murphy*, 111 U. S. 738, 741; *New Orleans, etc., R. R. Company* v. *Delamore*, 114 U. S. 501; *Traer* v. *Clews*, 115 U. S. 528, 533-4; *Roby* v. *Colehour*, 146 U. S. 153, 159-60; *Texas & Pacific Railway* v. *Johnson*, 151 U. S. 81, 98-9; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613; *Pittsburgh, etc., Railway* v. *Loan & Trust Co.*, 172 U. S. 493, 507, 510; *Talbot* v. *Sioux City First Nat'l Bank*, 185 U. S. 172; *Haire* v. *Rice*, 204 U. S. 291, 298-9; *Hammond* v. *Whittredge*, 204 U. S. 538; *West Side R. R. Co.* v. *Pittsburgh Cons. Co.*, 219 U. S. 92, 99; *Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U. S. 573, 590-1; *Atchison, etc., Ry. Co.* v. *Robinson*, 223 U. S. 173, 180; *Sage* v. *Hampe*, 235 U. S. 99; *Donohue* v. *Vosper*, 243 U. S. 59.)

By reason of the foregoing appellant firmly believes that the federal questions involved herein are substantial and that a decision upon them is essential to a disposition of the issues in this case, and that this court has

jurisdiction to review the judgment and decision appealed from.

Respectfully submitted,

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APPENDIX "A".

No. 41,210.

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation, *Appellee*,

vs.

RUFUS A. DEERING, As Register of Deeds of Sedgwick County, Kansas, and MARIE WARDEN, As County Treasurer of Sedgwick County, Kansas,
Appellants.

Syllabus by the Court.

1. In an action to recover money paid under protest by the Missouri Pacific Railroad Company to satisfy the amount of mortgage registration fees due as to two mortgages made by the railroad company, it is *held*: (a) The federal court sitting in bankruptcy and in putting into operation a plan for reorganization of the railroad did not order, and did not have the authority to order that no mortgage registration fees or taxes should be paid to state authorities upon the recording of the mortgages made by the railroad company under the reorganization plan; (b) The collection of the mortgage registration fees upon the recording of said railroad mortgages did not constitute a violation of the Fourteenth Amendment to the United States Constitution nor impose a burden upon interstate commerce; (c) The tax provided upon the recording of mortgages by G. S. 1949, 79-3101 *et seq.*, in no way violates the provisions of Article 11, Section 4 of the State Constitution.

2. The statute providing for the collection of mortgage registration fees creates a tax which is normally paid by the mortgagee of a mortgage of real property. This tax replaces all other forms of taxation as to the obligations secured by the mortgage.

Appeal from Sedgwick district court, division No. 3; B. MACK BRYANT, judge. Opinion filed March 7, 1959. Reversed.

Robert H. Nelson, of Wichita, argued the cause, and *W. A. Kahrs* and *Patrick F. Kelly*, both of Wichita, were with him on the briefs for the appellants.

Ralph M. Hope, of Wichita, argued the cause, and *W. F. Lilleston*, *George C. Spradling*, *Henry V. Gott*, *George Stallwitz*, *Richard W. Stavely*, *Charles S. Lindberg* and *Ronald M. Gott*, all of Wichita, were with him on the brief for the appellee.

The opinion of the court was delivered by

JACKSON, J.: This is an appeal from the decision of the district court holding that the Missouri Pacific Railroad Company need not pay the sum of $262,969.96 to the Register of Deeds of Sedgwick County to cover the mortgage registration "fees" due on two mortgages made by the railroad on all of its property. The suit was one filed by the railroad to recover these taxes which had been paid to the defendant county officials under protest and the county officials appeal from the adverse decision in the district court.

The case below was submitted to the court upon an agreed statement of facts which we shall condense to a certain extent. The Missouri Pacific, for approximately twenty-three years prior to March 1, 1956, had been in re-organization proceedings in the United States District

Court for the Eastern District of Missouri, Eastern Division, under the provisions of Section 77 of the Bankruptcy Act (U.S.C., Title 11, Section 205) and all of the property of the railroad had been owned and operated by the trustees appointed by the court and under the jurisdiction of the court.

The bankruptcy proceeding as to the Missouri Pacific Railroad was terminated by a consummation order and final decree signed by the court on March 1, 1956. Paragraph numbered 5 of the agreed statement of facts reads as follows:

> "5. Under the provisions and requirements of said plan of reorganization and under the provisions and requirements of said Consummation Order and by approval and authority of the interstate Commerce Commission and said court, two mortgages were executed and issued by plaintiff, such mortgages being a First Mortgage dated January 1, 1955, in favor of Boatmen's National Bank of St. Louis as Trustee, and a General (Income) Mortgage dated January 1, 1955, in favor of Manufacturers' Trust Company and Charles Herman as Trustees, which said mortgages covered and described said railroad and other property owned by plaintiff in Kansas and other states."

A copy of Section 10.04 of the federal court's final order is made a part of the agreed statement of facts and will be referred to later in this opinion.

It was further agreed between the parties that the defendants were the duly elected, qualified and acting register of deeds and county treasurer of Sedgwick County; that the defendants refused to accept the two mortgages issued under the terms of the consummation order of the federal court for registration without the payment of the mortgage registration fees as provided in G.S. 1949, 79-3101

et seq.; that the plaintiff thereupon paid to the register of deeds the sum of $262,969.96, being the amount of fees due to the various counties in Kansas where the property of the plaintiff is located, together with a written protest which was delivered to the register of deeds and to the county treasurer; a true copy of the written protest is attached to the agreed statement of facts. The parties further agreed that the money so paid under protest has been held by the defendant county treasurer and has not been distributed to any of the counties to which the monies would be apportioned under the provisions of the statute (G.S. 1949, 79-3105).

There was no dispute about the amount of the taxes collected, if said tax was due, nor about the manner in which the same would be apportioned among the fifty-six counties in Kansas where the property of the railroad is located. The sole question decided by the district court upon the agreed statement of facts appears to have been the liability of the Missouri Pacific Railroad under the law to pay this tax. The county officers appeal from the decision holding that the railroad mortgages might be registered without payment of the mortgage registration fees due on the proportion of the amount of the railroad notes or bonds secured by liens on real estate in Kansas.

There is a preliminary matter which must be disposed of before we can reach the merits of this appeal. Appellants' assignment of errors herein were as follows:

> "1. The court erred in granting judgment in favor of the plaintiff and against the defendants.
>
> "2. The court erred in overruling defendants' motion for a new trial."

Appellee earnestly urges that the above assignments are wholly insufficient to bring the questions in the instant

appeal before the court. As to the first assignment, the case of *Cimarron Co-Operative Equity Exchange* v. *Warner*, 166 Kan. 190, 200 P. 2d 283, is cited together with many others to like effect. In the *Warner* case, *supra*, this court said:

> "This court has repeatedly held that an assignment of error to the effect the trial court erred in rendering its judgment amounts to nothing more than a statement the decision is wrong, does not specify any error and presents no reviewable ruling to an appellate court. (See *Hamilton* v. *Binger*, 162 Kan. 415, 176 P. 2d 553, and cases there cited.)" (p. 192).

It will be noted that the Warner case was appealed to this court "after a full and complete trial" in which evidence had been introduced by both parties. In the case now before the bar, the matter was submitted to the trial court upon an agreed statement of facts and the court's decision thereon was very similar to a ruling on a demurrer. As we noted above, only a question of law can be involved in this case. Perhaps, appellants would have been more specific, if the first specification of error had read, "the trial court erred *as a matter of law* in granting judgment in favor of the plaintiff." But, since an error in law is the only error which could be appealed in this case, we are disposed to hold the first assignment of error sufficient to raise the questions here involved.

In considering the important questions raised by the appeal, we shall first consider the nature of the so-called mortgage registration "fee.". The lending of funds secured by liens on real estate has been an important business from the beginning of the history of this state. There has always been a companion question as to the method and means by which these funds so secured, as well as other invested funds, should be taxed by the state. It will be remembered

that in the early history of the state, the chief revenue of all governmental units came from *ad valorem* property taxes. It will be remembered that article 11, section 1, of the state constitution was amended by the people in 1924 to read in part: "Mineral products, money, *mortgages*, notes and other evidences of debt may be classified and taxed uniformly as to class as the legislature shall provide."

After the adoption of the above amendment and as authorized thereby the legislature enacted the statute providing for the mortgage registration fee. (Laws 1925, Ch. 273, now appearing as G. S. 1949, 79-3101 to 79-3107a.). Neither the legislature nor this court has shown any disposition to disguise the evident fact that the mortgage registration fee is a tax. In section 79-3103, it is provided that after the payment of the tax of twenty-five cents on each one hundred dollar valuation of the secured note "*the note secured thereby shall not be otherwise taxable.*" Thus, the legislature not only recognized the "fee" to be a tax, but provided that it should be in lieu of all present and future taxes.

This court has always recognized that the mortgage registration fee constituted a tax (see *Davis-Wellcome Mortgage Co.* v. *Haynes*, 119 Kan. 1, 237 Pac. 918; *Voran* v. *Wright*, 129 Kan. 1, 281 Pac. 938, on rehearing 129 Kan. 601, 284 Pac. 807; *Citizens Bank* v. *State Tax Commission*, 132 Kan. 5, 294 Pac. 940; *Home Owners' Loan Corp.* v. *Anderson*, 145 Kan. 209, 64 P. 2d 14; *Assembly of God* v. *Sangster*, 178 Kan. 678, 290 P. 2d 1057).

In the early cases just cited, it may be noted the mortgage registration fee was objected to not on the ground of discrimination against money invested in real estate mortgages, but as amounting to a discrimination in favor of such funds and against other invested capital. We be-

lieve that the present case is the first time the suggestion has been made that the mortgage registration fee was discriminatory by virtue of its own provisions.

It may be noted that money and other invested capital is taxed at the rate of five mills on the dollar (twice the rate imposed on money loaned on notes secured by real estate mortgages) by G. S. 1949, 79-3108 to 79-3120. Certainly, holders of real estate mortgage notes cannot be heard to complain of discrimination.

The principal contention made by the Missouri Pacific Railroad Company to sustain the position that the mortgages on the property of the railroad should be registered without paying the registration "fee" or tax is that such a procedure has been ordered by the federal court in its consummation order referred to *supra* in the agreed statement of facts. The pertinent section of the order reads:

> "'Upon payment of their proper recording and filing fees, all recording officers of recording districts (including Parishes and Cities, States and Counties) in which the properties of the Reorganized Company shall be located after the Consummation Date shall record or file or record this Order as well as all documents the execution of which is directed in this Order, or in the documents herein approved, as may be tendered to them for filing or recording, and to make such marginal or other notations in their records as may be necessary or appropriate to evidence and to record the true intent and purpose of all such documents tendered to them for filing or for recording, the laws of any state to the contrary notwithstanding.'"

We must quite frankly state that it seems most difficult to read the above paragraph of the order to direct the course urged by the appellee. It might even be less difficult to construe the paragraph as express authority to pay

the "mortgage recording fees." Certainly some element of taxation inheres in all such "fees."

Indeed it seems strange to believe that the court was declaring that the new railroad bonds in the hands of the mortgagees should be exempt from all taxes imposed by the states throughout the life of the bonds. Yet that would be the effect of the order should it be construed as contended by the railroad.

That the mortgage registration fee or tax is in reality a tax placed on the mortgagee and not upon the mortgagor (the railroad) is pointed out and made apparent in the cases of *Home Owners' Loan Corp.* v. *Anderson*, and *Assembly of God* v. *Sangster*, both *supra*. In the last case the court said:

> "One answer to this contention is that the legislature has seen fit to deal with the subject exempting church property from taxation (G. S. 1949, 79-201), but, as previously stated, the mortgage registration fee act contains no provision whatever exempting a mortgage on church property from payment of the required fee as a prerequisite to recording. Furthermore, it is the mortgagee, and not the mortgagor, who is interested in seeing that a mortgage on real estate is recorded, and it is he who pays the fee in question.
>
> • • •
>
> "We are aware of nothing in either the federal or our own constitution which prohibits the collection of this fee. Its collection is in no way an interference with or restraint upon religious activity. One reason is that, as previously stated, it is the mortgagee, not the mortgagor, who is interested in recording a mortgage, and who pays the fee. And, as a practical matter, the fact that a mortgagor and mortgagee agree between themselves that the former will reimburse the latter for the amount of the fee does not, from a legal stand-

point, alter the situation, and in no sense of the word does the collection of the fee amount to an interference with religious activities."

The words "the laws of any state to the contrary notwithstanding" as used in the consummation order are taken from U. S. C., Title 11, Section 205(f), which reads in part:

> "'Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan shall have full power and authority to and shall put into effect and carry out the plan and the orders of the judge relative thereto under and subject to the supervision and control of the judge, the laws of any state or the decisions or order of any state authority to the contrary notwithstanding.' 11 U. S. C. A. 205 (f)."

There can be no question as to the power of the federal court sitting in bankruptcy to provide for a plan of reorganization for the debtor corporation. But it would seem that section 205f was directed toward the court's control over the plan as to possible corporate re-organization and the issuing of stock and other evidence of interests therein which are clearly within the plenary jurisdiction of the United States courts and of the Interstate Commerce Commission.

No authority has been cited which would support the view that the federal court should be authorized to issue an order exempting the holders of the bonds of the reorganized corporation from all taxation on their interests in the new company. Our research would indicate only the contrary (see 10 Remington on Bankruptcy, §4262; 5 Moore's Collier on Bankruptcy, ¶ 77.22, p. 547; *In re Missouri Pac. R. Co.*, 39 F. Supp. 436; *In re Chicago, R. I. & P. Ry. Co.*, 168 F. 2d 587; *Commission of Dept. of P. U.* v. *New York, N. H. & H. R. Co.*, 178 F. 2d 559; *State of Texas*

v. *Group of Institutional Investors*, 191 F. 2d 265, certiorari denied 342 U. S. 904, 96 L. Ed. 676, 72 S. Ct. 293; 343 U. S. 929, 96 L. Ed. 1339, 72 S. Ct. 757; and see memorandum opinion by Mr. Justice Frankfurter found in 343 U. S. 982, 96 L. Ed. 1372, 72 S. Ct. 1018.

Appellee calls attention to the fact that the mortgages may not be received in evidence in any suit in any court of this state unless the registration tax has been paid (G. S. 1949, 79-3107). Of course, it might be added the tax may be paid at any time before the trial of the case, and the statute at no time declares the obligation void regardless of the payment of the tax (*Lewis* v. *Independence Hotels Co.*, 150 Kan. 840, 96 P. 2d 605). It has been shown *supra* that the only discriminative features of the mortgage registration tax are favorable to the holders of such securities. These holders are entitled to registration and preservation of their liens and are entitled to use the state courts to collect and enforce their claims whether they be residents or non-residents of the state. No question has been raised as to the situs for taxation of the obligation secured by the mortgages on Kansas real estate. Certainly such obligations receive protection from the state government.

It is quite evident to anyone having any knowledge of the problem of taxation that the collection of any tax upon intangible personal property presents difficulty. Of course, the question of the collection of taxes upon personal property of all kinds has always presented a problem. The legislature with authority from the state constitution framed this reasonable property tax in the form of an excise tax, providing that the tax would be paid at the time of recording of the mortgage for record. This was the first and usual time when most mortgagees use the special facilities furnished by the state for their benefit. If the fee or tax is paid at that time, the notes thereafter are tax exempt.

However, if the tax is not paid because the mortgagee chooses not to record his lien, and runs the risk of loss of his priority, no penalty is exacted, his note and mortgage is still valid, but if he chooses to use the courts of the state to collect a judgment, he must pay the normal tax due on his property. Appellee's contention that this statute violates the Fourteenth Amendment to the United States Constitution appears to this court to be without merit.

Appellee also argues without citation of authority, which appeals to us to be pertinent, that payment of the tax would be a burden upon interstate commerce. Just how this postulate would be valid escapes us. The tax is chargeable without reference to residence of the owner on non-residents and residents alike. All mortgagees owning obligations secured by liens on Kansas real estate are required to pay the reasonable fee if they wish to use the governmental facilities of the state provided for their benefit. In this case, as shown above, the tax is not assessed against the railroad and the benefits are furnished to the bond-holders. It would seem to have been easily possible to provide a plan under which the mortgage registration fees or tax assessed upon these mortgages could have been charged to the bondholders or mortgagees in this case. The fact that apparently it was planned for the railroad to pay the same along with the other recording fees does not legally prevent the tax being assessed against the mortgagees (see *Assembly of God* v. *Sangster*, *supra*).

It would seem more logical to contend that a property tax upon the roadbed of the appellee was a burden upon interstate commerce than to object to this tax upon the property of the railroad's creditors.

Lastly, it is contended that the mortgage registration fee statute is unconstitutional under article 11, section 4,

of the state constitution as having no object to which the tax is to be applied.

By the provisions of Section 79-3104 of the statute, the register of deeds is ordered to collect the taxes, keep an accurate record of same and pay the funds to the county treasurer at least once each day. The treasurer is directed to likewise keep a record of the funds so paid to him, and to credit the same to the county general fund. That is the fund to which all general taxes are credited. The contention is novel, but requires no further comment.

There is a presumption of legality as to all legislation. Moreover, taxation is the general rule, exemption the exception (*Assembly of God* v. *Sangster, supra*). It would appear that no valid reason has been urged upon the court which would show that the bonds of the Missouri Pacific Railroad Company in the hands of the holders thereof should not be charged with the normal mortgage registration fees when the mortgages securing those bonds were recorded by the defendant register of deeds. Therefore, the decision of the district court should be reversed.

It is hereby so ordered.

APPENDIX "B".

DISTRICT COURT
EIGHTEENTH JUDICIAL DISTRICT
Division Number Three
Wichita 5, Kansas

Chambers of
B. Mack Bryant
Judge

February 6, 1958

IN RE: Missouri Pacific Railroad Company
vs. Rufus Deering, as Register of Deeds
of Sedgwick County, Kansas and
Marie Warden, as County Treasurer of
Sedgwick County, Kansas
CASE NO. A-59512

Mr. Ralph M. Hope
Attorney at Law
923 First National Bank Building
Wichita, Kansas

Dear Sir:

I have had under consideration the above entitled case together with the agreed statement of facts filed by all parties.

The Supreme Court of the State of Kansas has, in my opinion, held in the case of Home Owners' Loan Corp. vs. Anderson Vol. 145 of the Kansas Reports, page 210 and again in the case of Assembly of God vs. Sangster Vol. 178, page 679 the mortgage registration fee as provided for by G. S. 1949, 79-3102 to 79-3107 to be a tax.

It is my opinion that the two mortgages delivered and tendered to Rufus E. Deering, Register of Deeds of Sedgwick County, Kansas, on March 12, 1956, for the purpose of having said mortgages recorded in the office of said Register of Deeds of Sedgwick County, Kansas were not subject to being taxed by the State of Kansas or any county therein. These mortgages were subject only to the regular recording and filing fees on said mortgages.

It is the ruling and judgment of this court that the two mortgages described in the agreed statement of facts and referred to above were not on the 12th day of March, 1956, and are not now subject to the registration fees referred to in G. S. 1949, 79-3102 to 79-3107.

It is the further ruling and order of this court that the plaintiff have and receive and the plaintiff is hereby awarded judgment against the defendants, and each of them, in the sum of $262,969.96, together with interest thereon at the rate of six per cent per annum from March 12, 1956 until paid and for its costs.

Yours very truly,

/s/ B. Mack Bryant,
B. Mack Bryant.

cc: Robert H. Nelson
Attorney at Law
Union Center Building
Wichita, Kansas

APPENDIX "C".

IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,
Plaintiff,

vs.

RUFUS E. DEERING, as REGISTER OF DEEDS of Sedgwick County, Kansas, and MARIE WARDEN, as COUNTY TREASURER of Sedgwick County, Kansas,
Defendants.

No. A-59512.

Journal Entry of Judgment.

Now on this 6th day of February, 1958, the above-entitled cause comes on for decision, said cause having been previously submitted to the Court for decision upon the Agreed Statement of Facts filed herein and the parties requested by the Court to file briefs herein.

Thereupon the Court, having considered the facts set forth in said Agreed Statement of Facts and the briefs filed herein by the parties, and being fully advised in the premises, finds generally in favor of the plaintiff and that plaintiff delivered and tendered the two mortgages involved herein to defendant Rufus E. Deering, the Register of Deeds of Sedgwick County, Kansas, for filing and recording under the provisions of G. S. 1949, 67-901; that the so-called mortgage registration fee provided by G. S. 1949, 79-3102 to 79-3107, is not a fee but is a tax, and under the agreed facts herein the plaintiff is not subject to said tax and cannot

be required to pay the same and said plaintiff is entitled to have its two said mortgages filed and recorded by said defendant Register of Deeds without payment of said tax; that plaintiff duly paid under protest to said defendant Register of Deeds the sum of $262,969.96 and is entitled to recover from defendants herein said sum of $262,969.96 so paid under protest.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that the plaintiff recover herein from defendants the sum of $262,969.96 and its costs herein.

B. Mack Bryant,
Judge of the District Court.

APPENDIX "D".

11 U.S.C., Sec. 205(f):

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall, be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper

and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and and not inconsistent with the provisions and purposes of Chapter 1 of Title 49 as on August 27, 1935, or thereafter amended. The provisions of sections 77a to 77aa of Title 15 shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said sections, be treated as if they were specifically mentioned in sections 77c and 77d of Title 15, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subsection (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) of this section. The provisions of subdivision (a) of Section 78n of Title 15 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) of this section.

APPENDIX "E".

Consummation Order and Final Decree.

"10.04. *Recording and Filing Documents.* Upon payment of their proper recording and filing fees, all recording officers of recording districts (including Parishes and Cities, States and Counties) in which the properties of the Reorganized Company shall be located after the Consummation Date shall record or file for record this Order as well as all documents the execution of which is directed in this Order, or in the documents herein approved, as may be tendered to them for filing or recording, and to make such marginal or other notations in their records as may be necessary or appropriate to evidence and to record the true intent and purpose of all such documents tendered to them for filing or for recording, the laws of any state to the contrary notwithstanding."

APPENDIX "F".

General Statutes of Kansas, 1949:

79-3102. Registration fee: exemptions. Before any mortgage of real property, or renewal or extension of the same shall be received and filed for record on and after the first day of March, 1925, there shall be paid to the register of deeds of the county in which such property or any part thereof is situated, a registration fee for each one hundred dollars and major fraction thereof, of the principal debt or obligation which is secured by such mortgage, the sum of 25 cents: that no registration fee whatsoever be paid, collected or required for or on any mortgage or other instrument, given solely for the purpose of correcting or perfecting a previously recorded mortgage or other instrument, or for the purpose of providing additional security for the same indebtedness, where the registration fee herein provided for has been paid on the original mortgage or instrument: *Provided, however,* That the register of deeds shall receive no additional fees or salary by reason of the receipt of fees as herein provided: *Provided further,* That after the payment of the registration fees as aforesaid the mortgage and the note thereby secured shall not otherwise be taxable. [L. 1925, ch. 273, § 2; Feb. 23.]

79-3103. Mortgages recorded prior to March 1, 1925; payment of fee: exemption from other taxes and penalties. The holder of any mortgage of real estate recorded prior to March 1, 1925, may pay to the register of deeds of the proper county the tax herein prescribed, upon the amount of debt secured by the mortgage at the time of such pay-

ment, as shown by the affidavit of the owner of such mortgage, filed with said register of deeds, for the unexpired term of such mortgage. The register of deeds upon such payment shall endorse upon the said instrument a receipt for the payment of such registration fee, together with the unpaid amount of the secured indebtedness at the date of such payment. Thereafter such mortgage and the note secured thereby shall not be otherwise taxable, and no penalties or back taxes shall be imposed or collected upon any such mortgage or debt by reason of such mortgage having theretofore been withheld or omitted from the assessment rolls. [L. 1925, ch. 273, § 3; Feb. 23.]

79-3104. Duties of register of deeds. The registration fees herein provided for shall be in addition to the fees fixed by law for filing and recording such instruments. Upon payment of the registration fee to the register of deeds, it shall be his duty to endorse upon the instrument presented a receipt for the payment of such fee, which shall be substantially in the following terms:

Registration Fee:

Fees, $

No.

Amount of indebtedness, $

Paid this day of , 19

Register of deeds,
County, Kansas.

The register of deeds shall number each instrument on which a registration fee has been paid, and keep in a book provided for that purpose a record of such number, description of such mortgage, and the amount of the regis-

tration fee collected. The register of deeds shall file with the county treasurer of the county where paid, at least once each day, a report showing the amount of each mortgage, the fees collected thereon, and a description of the real estate mortgaged, and therewith pay to said treasurer the fees collected thereon, who shall keep an account of same and shall credit such fees to the county general fund. [L. 1925, ch. 273, § 4; L. 1927, ch. 335, § 1; March 21.]

79-3105. Property in two or more counties; apportionment. When a mortgage covers property situated in two or more counties, the registration fee herein provided for shall be paid to the register of deeds and county treasurer as hereinbefore provided, of the county where it is first presented for record, and the county treasurer so receiving such fee shall apportion the same among the counties in which the real property is situated, in proportion to its assessed valuation, and promptly pay over such proportionate amounts to the respective county treasurers. Should any contention arise as to the division and distribution fees, the same shall be referred to the state commission of revenue and taxation, who are hereby authorized and directed to decide the same, which decision shall be final. [L. 1925, ch. 273, § 5; Feb. 23.]

79-3106. Property located partly within and partly without state. Where the real property covered by a mortgage presented for registration is located partly within and partly without this state, the register of deeds shall determine the amount of the indebtedness to be used as the basis for the registration fee to be collected, by taking the relative assessed valuation of the property located within and without this state. Any holder of such mortgage deeming himself aggrieved by the determination of the register of deeds may apply to the state commission

of revenue and taxation for an adjustment of the same, and the determination of such commission shall be final. [L. 1925, ch. 273, § 6; Feb. 23.]

79-3107. Mortgage not to be recorded until registration fee paid. Any mortgage of real property executed on or after March 1, 1925, on which the registration fee as herein provided has not been paid, shall not be filed for record by any register of deeds, and such mortgage shall not be received in evidence in any suit, action or proceeding, and no judgment, decree or order for the enforcement thereof shall be rendered, made or entered in or by any court in this state. [L. 1925, ch. 273, § 7; Feb. 23.]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 253.

MISSOURI PACIFIC RAILROAD COMPANY,
a Corporation,
Appellant,

vs.

RUFUS E. DEERING, As Register of Deeds of Sedgwick County, Kansas, and MARIE WARDEN, As County Treasurer of Sedgwick County, Kansas,
Appellees.

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS.

PETITION FOR REHEARING.

W. F. LILLESTON,
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923 First National Bank Building,
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*Attorney upon whom service should be made.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-8080

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IN THE

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MISSOURI PACIFIC RAILROAD COMPANY,
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RUFUS E. DEERING, As Register of Deeds of Sedgwick County, Kansas, and MARIE WARDEN, As County Treasurer of Sedgwick County, Kansas,
Appellees.

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS.

PETITION FOR REHEARING.

Appellant respectfully requests a rehearing herein.

The opinion of the court filed October 12, 1959, did not state the reason or ground upon which the appeal herein was dismissed and we are left to conjecture on that point.

However, since appellant's Jurisdictional Statement set out the provisions of the appeal statute upon which the

appeal and the jurisdiction thereof is based (Title 28, U.S.C., Section 1257 [1] [2]) and the questions in the case as shown by the Jurisdictional Statement are those referred to in that statute, and since appeal is a matter of right where such questions are substantial (*Ireland* v. *Woods*, 246 U.S. 323, 328), we can only assume that the appeal was dismissed because the court believed the federal questions involved in the appeal are not substantial. Perhaps we did not discuss that question in the Jurisdictional Statement at as great length or as sufficiently in connection with the merits as we should have, for we are confident that the federal questions are substantial.

As this court said in *Milheim* v. *Moffat Tunnel Dist.*, 262 U.S. 710, 716-17, where the federal question presented is one requiring analysis and exposition for its decision it is not frivolous, and we believe that statement certainly applies to the federal questions involved in the present case.

The Kansas Mortgage Registration Law (G.S. 1949, 79-3102 to 3107) and Its Application to Appellant's Mortgages Violates the Due Process Clause of the Fourteenth Amendment.

The Kansas mortgage registration statute involved, which is set out in full in the appendix to the Jurisdictional Statement, provides by Section 79-3107 thereof as follows:

> "Any mortgage of real property executed on or after March 1, 1925, on which the registration fee as herein provided has not been paid, shall not be filed for record by any register of deeds, and such mortgage shall not be received in evidence in any suit, action or proceeding, and no judgment, decree or order for the enforcement thereof shall be rendered, made or entered in or by any court in this state."

It has been held by the Supreme Court of Kansas that the failure to pay the tax provided by the mortgage registration law does not invalidate the obligation created by the mortgage. (*Fowler* v. *Moore*, 147 Kan. 108, 75 P.2d 222; *Lewis* v. *Independence Hotels Co.*, 150 Kan. 840, 96 P.2d 605.) So, involved in this appeal are two mortgages which were issued under the authority of the reorganization court, a federal court of competent jurisdiction, which were perfectly valid obligations but which the recording officials refused to record, and which courts will, under the statute, refuse to enforce, without the payment of a tax not required by the federal law or the federal court, and notwithstanding the federal court ordered them recorded upon payment of the filing and recording fees only, which were paid. We, therefore, have here the anomaly of a right without a remedy. This is in violation of due process of law under Section 1 of the Fourteenth Amendment.

It is not within the power of a state to take away all remedy for the enforcement of a right. (*Poindexter* v. *Greenhow*, 114 U.S. 270.) And although probably reasonable conditions may be imposed on the exercise of the remedy they may not be imposed when they are onerous and excessive as here. (*Ex parte Young*, 209 U.S. 123.) Also, while a legislature has general power, of course, to prescribe rules of evidence, it does not have the power to, and cannot under due process of law, establish rules which, under the guise of regulating the presentation of evidence, altogether prohibit a party from exhibiting his rights and all of the facts bearing upon the issue (*Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U.S. 35, 43; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 82), which is what G.S. 1949, 79-3107, does here. This is not the situation of a statute changing the rules of evidence by creating pre-

sumptions or a different period of limitation, or shifting the burden of proof, or making certain evidence *prima facie* evidence, which is held to be permissible, but is a situation where no evidence of the subject of the action may be introduced, which is quite different and is not permissible.

This court has further held that "the due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved," and that "that includes the right to introduce evidence and have judicial findings based upon it." (*B. & O. R. Co. v. United States*, 298 U.S. 349, 368-9.) That is not permitted under the mortgage registration law since it does not permit evidence of the obligation of the mortgages to be introduced.

The obligations under the two railroad mortgages in question will presumably be held by hundreds, perhaps thousands, of persons who, if the statute be held applicable here, could not enforce their security without the payment of a mortgage registration tax not required by the federal law, the Interstate Commerce Commission or the federal court authorizing the security. Such denial of access to the courts cannot be justified.

> "The Fourteenth Amendment undoubtedly intended * * * that all persons * * * should have access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts." (*Barbier v. Connolly*, 113 U.S. 27, 31.)

See, also, *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U.S. 230.

Even if the mortgage registration statute is not unconstitutional on its face, we have contended at all times in

this case that its application to appellant's mortgages was unconstitutional and therefore invalid. This contention is in accordance with the rule set forth in *Poindexter* v. *Greenhow*, 114 U.S. 270, where it was said at page 295:

> "And it is no objection to the remedy in such cases, that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous, where the tax laws of a State, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining of a right secured to him by the Constitution of the United States."

And in *Fiske* v. *Kansas*, 274 U.S. 380, it is stated at page 385:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under Sec. 237 of the Judicial Code. *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 288. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented. *Ward & Gow* v. *Krinsky*, 259 U.S. 503, 510; *Cudahy Co.* v. *Parramore*, 263 U.S. 418, 422. And see *St. Louis, etc., Railway* v. *Wayne*, 224 U.S. 354, 359."

There is another important matter we should call to the attention of the court. As the record shows and as we

pointed out in our Jurisdictional Statement, the mortgages were a part of the reorganization proceedings under the bankruptcy act and the issuance of them was a part of the reorganization plan and proceedings. Not only did the federal court order them recorded under statutory authority (11 U. S. C., Section 205f), but a Kansas statute entirely apart from the mortgage registration law provides for the recording *upon payment of recording fees* of all orders and decrees "or other paper" in bankruptcy proceedings, the statute providing as follows:

> "The register of deeds of any county wherein is located any land in which a bankrupt or a debtor in any proceeding under the act of congress relating to bankruptcy has any interest shall receive for record and record a certified copy of any pleading, decree, order or other paper, filed in said proceeding, which any act of the congress of the United States provides may be recorded in the records of such a county. Such record shall impart notice to all persons of such bankruptcy proceeding and of the contents of said certified copy, which shall be recorded and indexed in the record of deeds in the office of said register in the name of the bankrupt or debtor as grantor and in the name of the trustee or receiver in bankruptcy or other person (if any) to whom said interest or any part thereof may pass by virtue of law or of said decree, order or other paper as grantee. *Said register shall charge and collect the same fee for recording such a certified copy as is provided by law for recording a deed of the same length.*" (G. S. 1949, 67-901.) (Emphasis ours.)

Under that statute appellee Register of Deeds was required to record the two mortgages involved here, they being a part of the bankruptcy proceedings and being tendered to him for recording and the filing and recording fees being paid. This would also constitute the notice and evidence apparently contemplated by 11 U.S.C., Section 205(k).

Enforcement of the Kansas Mortgage Registration Law with Respect to Appellant's Mortgages Would Constitute a Burden on Interstate Commerce.

There is also involved in this appeal the question whether the enforcement of the Kansas mortgage registration law would constitute a burden on interstate commerce and an undue interference with the order of the federal reorganization court. The bonds and mortgages here involved were authorized and approved by the Interstate Commerce Commission under the provisions of 49 U.S.C., Section 20a, and the federal reorganization court under the bankruptcy statute, both obviously addressing themselves to the interstate commerce conducted by a common carrier in many states.

The reorganization court and the Interstate Commerce Commission had the authority, jurisdiction and right to, and did, order the old mortgages (which made the railroad bankrupt) discharged of record and the new mortgages involved here placed of record (see Consummation Order and Final Decree), so that the bonds secured thereby and issued as a part of the reorganization plan and proceeding to rehabilitate the railroad could be marketed, since nobody would knowingly buy a bond secured by mortgages not placed of record.

The case of *Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Commission*, 183 Wis. 47, 197 N.W. 352, involves a similar situation to that here. There the Supreme Court of Wisconsin held:

> "Statutes requiring railroad engaged in interstate commerce to obtain the consent of the (Wisconsin) Railroad Commission to issuance of securities are superseded by Transportation Act, Sec. 20a (U. S. Comp. St. Ann. Supp. 1923, Sec. 8592a), prohibiting carriers from issuing securities without the authority

of the Interstate Commerce Commission, since under such statute Congress, through the agency of the Interstate Commerce Commission, has assumed exclusive control over such securities, in view of Sections 1 (17), 5 (6) c, 13 (4), 20a (7) (Sections 8563, 8567, 8581, 8592a)." (Syl. par. 3.)

In the course of its opinion the court said:

"* * * *It is claimed that the (state) statute relied on by defendant was superseded by the federal statute and that is undoubtedly a federal question.*" (p. 355.) (Emphasis ours.)

Continuing the court said:

"The financial problem is constantly facing carriers. The great transportation corporations carrying on business between the states are the instruments of commerce. They are generally carrying heavy indebtedness. The ability to make provision for interest and principal as it matures is of vital importance. The inability to meet these obligations may lead, and often has led, to deterioration of the physical properties, and to disaster and bankruptcy, causing inefficiency in the service due to the general public."

* * *

"When state Legislatures undertake to restrict the power of carriers doing an interstate business to raise money vitally necessary for carrying on their commerce between the states, that legislation is dealing with an instrumentality of commerce." (p. 358.)

The Supreme Court of Kansas Held in Effect That 11 U.S.C., Section 205(f) and the Federal Reorganization Court's Order Issued Thereunder Were Invalid and Disregarded Them.

The Consummation Order and Final Decree of the federal reorganization court by Section 10.04 thereof or-

dered and required that all recording officers should record all documents provided by the order (which, of course, included the two mortgages) upon payment of the proper recording and filing fees, "the laws of any state to the contrary notwithstanding." This order was in accordance with 11 U.S.C., Section 205(f), which requires that such orders be carried out, "the laws of any state or the decisions or order of any state authority to the contrary notwithstanding."

However, the appellee Register of Deeds refused to comply with that order notwithstanding the recording and filing fees were paid, and required the payment of the mortgage registration tax before he would record the mortgages.

The Supreme Court of Kansas held that the reorganization court did not order the mortgages recorded without payment of the registration tax and that it did not have the authority to do so, and disregarded the order. Thus both the applicability and the validity of both the order and the statute upon which it was based, which was an issue in the case, was passed upon adversely and the order was disregarded, which presents here a substantial federal question.

The decision of the Supreme Court of Kansas was premised upon the holding that the reorganization court "did not order, *and did not have the authority to order,* that no mortgage registration fees or taxes be paid." (*Missouri Pacific Railroad Co.* v. *Deering*, 184 Kan. 283, 336 P.2d 482, Syl. par. 1[a].) Actually the reorganization court's order did not contemplate or have anything to do with the payment of taxes upon the mortgages. That order was a directive more general in scope than merely one to record specific mortgages. Its directive

was that all recording officers of recording districts (including parishes and cities, states and counties) should file and record the *order* itself and *"all documents the execution of which is directed in this order"*—all part of the reorganization plan itself—*the laws of any state to the contrary notwithstanding* and this necessarily must be interpreted to include any law providing for a *condition precedent* to such filing and recording, as is provided by G.S. 1949, 79-3102 to 79-3107. This is very different from an order that no taxes to which they may be subject shall not be paid, especially since the law contemplates that they shall be paid by the *mortgagees* and not the mortgagor, such as appellant. An examination of the Order of Consummation and Final Decree will show that it provides for the satisfaction and release of pending mortgages, amendments to the articles of incorporation, deeds, and other instruments, as well as the new mortgages which alone were subject to a tax. These instruments, including the mortgages and the order itself, were filed and recorded in all of the 60 counties in Kansas where the property is located, in accordance with the requirement of Section 10.04 and as probably contemplated by 11 U.S.C., Section 205(k). As we have pointed out, appellee Register of Deeds was also required to file and record them under the provisions of another Kansas statute, G.S. 1949, 67-901, which provides for the recording of all papers constituting a part of bankruptcy proceedings.

The Federal Bankruptcy Law and the Interstate Commerce Act are the supreme law of the land (United States Constitution, Art. VI) and they take precedence over any state law. (*Stoll* v. *Gottlieb*, 305 U.S. 165; *Case* v. *Bowles*, 327 U.S. 92, 102; *R. F. C.* v. *Beaver County*, 328 U.S. 204, 206-7; *Morris* v. *Jones*, 329 U.S. 545, 553; *Seaboard R. Co.* v. *Daniel*, 333 U.S. 118.) The reorganization court's

orders issued under and based upon those laws accordingly became the law of the land and took precedence over any Kansas statute providing any condition precedent to carrying out such orders, such as the Kansas mortgage registration law. The order here was made by the reorganization court specifically under the provisions of Section 205(f) of the bankruptcy law (11 U.S.C., Section 205f). Applying the language of this court in *Conner v. Long*, 104 U.S. 228, 240, the part of the bankruptcy law here involved "is as truly the law of each State, as it is, and because it is, a law of the United States." Thus, the bankruptcy law "is as truly the law" of Kansas as is the mortgage registration law, with the difference that the bankruptcy law is the supreme law of the land—the supreme law of Kansas. Appellee Register of Deeds and the Supreme Court of Kansas ignored both the federal statute and the Consummation Order and Final Decree issued thereunder (as well as G.S. 1949, 67-901) and did not recognize the supremacy of the federal law. It seems clear that this presents a substantial federal question.

We respectfully submit that substantial federal questions are presented by this appeal and request a rehearing herein and reconsideration of the order dismissing this appeal.

We further contend that if an appeal is not allowed then a writ of certiorari should issue because of the importance of the federal questions involved. As we pointed out in our Jurisdictional Statement there can be no question that a right, privilege and immunity under a statute of and authority exercised under the United States was specially set up in this case, and we believe certiorari should be granted under the authority of the decisions cited on page 13 of our Jurisdictional Statement. The fact that the state court's ruling disregarded

the order and decree of the federal court also justifies the granting of certiorari. (*Stoll* v. *Gottlieb*, 305 U.S. 165.)

Respectfully submitted,

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CERTIFICATE.

I hereby certify that the above and foregoing Petition for Rehearing is filed and presented to the court in good faith and not for the purpose of delay.

Ralph M Hope